

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

DIANE BUTLER,

Plaintiff,

v.

CAROLYN W. COLVIN, Acting
Commissioner of Social Security
Administration,

Defendant.

NO: 1:15-CV-3162-TOR

ORDER GRANTING PLAINTIFF'S
MOTION FOR SUMMARY
JUDGMENT

BEFORE THE COURT are the parties' cross-motions for summary judgment (ECF Nos. 17, 20). These matters were submitted for consideration without oral argument. The Court—having reviewed the administrative record and the parties' completed briefing—is fully informed. For the reasons discussed below, the Court grants Plaintiff's motion and denies Defendant's motion.

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JURISDICTION

The Court has jurisdiction over this case pursuant to 42 U.S.C. §§ 405(g), 1383(c)(3).

STANDARD OF REVIEW

A district court's review of a final decision of the Commissioner of Social Security is governed by 42 U.S.C. § 405(g). The scope of review under section 405(g) is limited: the Commissioner's decision will be disturbed "only if it is not supported by substantial evidence or is based on legal error." *Hill v. Astrue*, 698 F.3d 1153, 1158-59 (9th Cir. 2012) (citing 42 U.S.C. § 405(g)). "Substantial evidence" means relevant evidence that "a reasonable mind might accept as adequate to support a conclusion." *Id.* at 1159 (quotation and citation omitted). Stated differently, substantial evidence equates to "more than a mere scintilla[,] but less than a preponderance." *Id.* (quotation and citation omitted). In determining whether this standard has been satisfied, a reviewing court must consider the entire record as a whole rather than searching for supporting evidence in isolation. *Id.*

In reviewing a denial of benefits, a district court may not substitute its judgment for that of the Commissioner. If the evidence in the record "is susceptible to more than one rational interpretation, [the court] must uphold the ALJ's findings if they are supported by inferences reasonably drawn from the record." *Molina v. Astrue*, 674 F.3d 1104, 1111 (9th Cir. 2012). Further, a district court "may not

1 reverse an ALJ's decision on account of an error that is harmless.” *Id.* An error is
2 harmless “where it is inconsequential to the [ALJ's] ultimate nondisability
3 determination.” *Id.* at 1117 (internal quotation marks and citation omitted). The
4 party appealing the ALJ’s decision generally bears the burden of establishing that
5 it was harmed. *Shinseki v. Sanders*, 556 U.S. 396, 409-10 (2009).

6 **FIVE-STEP SEQUENTIAL EVALUATION PROCESS**

7 A claimant must satisfy two conditions to be considered “disabled” within
8 the meaning of the Social Security Act. First, the claimant must be “unable to
9 engage in any substantial gainful activity by reason of any medically determinable
10 physical or mental impairment which can be expected to result in death or which
11 has lasted or can be expected to last for a continuous period of not less than twelve
12 months.” 42 U.S.C. § 1382c(a)(3)(A). Second, the claimant’s impairment must be
13 “of such severity that he is not only unable to do his previous work[,] but cannot,
14 considering his age, education, and work experience, engage in any other kind of
15 substantial gainful work which exists in the national economy.” *Id.*

16 § 1382c(a)(3)(B).

17 The Commissioner has established a five-step sequential analysis to
18 determine whether a claimant satisfies the above criteria. *See* 20 C.F.R. §
19 416.920(a)(4)(i)-(v). At step one, the Commissioner considers the claimant’s work
20 activity. *Id.* § 416.920(a)(4)(i). If the claimant is engaged in “substantial gainful

1 activity,” the Commissioner must find that the claimant is not disabled. *Id.*
2 § 416.920(b).

3 If the claimant is not engaged in substantial gainful activities, the analysis
4 proceeds to step two. At this step, the Commissioner considers the severity of the
5 claimant’s impairment. *Id.* § 416.920(a)(4)(ii). If the claimant suffers from “any
6 impairment or combination of impairments which significantly limits [his or her]
7 physical or mental ability to do basic work activities,” the analysis proceeds to step
8 three. *Id.* § 416.920(c). If the claimant’s impairment does not satisfy this severity
9 threshold, however, the Commissioner must find that the claimant is not disabled.
10 *Id.*

11 At step three, the Commissioner compares the claimant’s impairment to
12 several impairments recognized by the Commissioner to be so severe as to
13 preclude a person from engaging in substantial gainful activity. *Id.* §
14 416.920(a)(4)(iii). If the impairment is as severe or more severe than one of the
15 enumerated impairments, the Commissioner must find the claimant disabled and
16 award benefits. *Id.* § 416.920(d).

17 If the severity of the claimant’s impairment does meet or exceed the severity
18 of the enumerated impairments, the Commissioner must pause to assess the
19 claimant’s “residual functional capacity.” Residual functional capacity (“RFC”),
20 defined generally as the claimant’s ability to perform physical and mental work

1 activities on a sustained basis despite his or her limitations, *id.* § 416.945(a)(1), is
2 relevant to both the fourth and fifth steps of the analysis.

3 At step four, the Commissioner considers whether, in view of the claimant's
4 RFC, the claimant is capable of performing work that he or she has performed in
5 the past ("past relevant work"). *Id.* § 416.920(a)(4)(iv). If the claimant is capable
6 of performing past relevant work, the Commissioner must find that the claimant is
7 not disabled. *Id.* § 416.920(f). If the claimant is incapable of performing such
8 work, the analysis proceeds to step five.

9 At step five, the Commissioner considers whether, in view of the claimant's
10 RFC, the claimant is capable of performing other work in the national economy.
11 *Id.* § 416.920(a)(4)(v). In making this determination, the Commissioner must also
12 consider vocational factors such as the claimant's age, education, and work
13 experience. *Id.* If the claimant is capable of adjusting to other work, the
14 Commissioner must find that the claimant is not disabled. *Id.* § 416.920(g)(1). If
15 the claimant is not capable of adjusting to other work, the analysis concludes with
16 a finding that the claimant is disabled and is therefore entitled to benefits. *Id.*

17 The claimant bears the burden of proof at steps one through four above.
18 *Bray v. Comm'r of Soc. Sec. Admin.*, 554 F.3d 1219, 1222 (9th Cir. 2009). If the
19 analysis proceeds to step five, the burden shifts to the Commissioner to establish
20 that (1) the claimant is capable of performing other work; and (2) such work

1 “exists in significant numbers in the national economy.” 20 C.F.R. §§
2 404.1560(c), 416.960(c)(2); *Beltran v. Astrue*, 700 F.3d 386, 389 (9th Cir. 2012).

3 **ALJ’S FINDINGS**

4 On December 15, 2011, Plaintiff protectively filed an application for
5 supplemental security income under Title XVI, Tr. 283-88, alleging an amended
6 disability onset date of April 1, 2011, Tr. 46.¹ This application was denied initially
7 and upon reconsideration, Tr. 187-95, 203-11, and Plaintiff requested a hearing, Tr.
8 212-13. A video hearing was held with an Administrative Law Judge (“ALJ”) on
9 November 27, 2013. Tr. 42-97. On February 10, 2014, the ALJ issued a decision
10 denying Plaintiff benefits. Tr. 18-41.

11 At step one, the ALJ found that Plaintiff had not engaged in substantial
12 gainful activity since April 1, 2011, the amended alleged onset date. Tr. 24. At step
13 two, the ALJ found that Plaintiff had the following severe impairments: major
14 depressive disorder, social phobia, and polyarthralgia. Tr. 24-25. At step three, the
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16 ¹ Plaintiff also protectively filed an application for a period of disability and
17 disability insurance benefits under Title II, initially alleging a disability onset date
18 of December 30, 2011, Tr. 281-82; however, Plaintiff amended her onset date at
19 the hearing, and, because her date last insured was June 30, 2002, she surrendered
20 her Title II claim. *See* Tr. 46.

1 ALJ found that Plaintiff did not have an impairment or combination of
2 impairments that meets or medically equals the severity of a listed impairment. Tr.
3 25-27. The ALJ then determined that Plaintiff had the RFC
4 to perform light work as defined in 20 CFR 404.1567(b) and
5 416.967(b) except: Considering the effects of pain, the claimant
6 would be able to occasionally climb ramps and stairs, but could never
7 climb ladders, ropes or scaffolds; can occasionally balance, stoop,
8 kneel, crouch and crawl; can engage in frequent bilateral handling and
9 fingering; needs to avoid concentrated exposure to extreme cold,
10 vibration and hazards such as moving machinery and unprotected
11 heights; in order to meet ordinary and reasonable employer
12 expectations regarding attendance, production and work-place
13 behavior, she can understand, remember and carry-out simple, routine
14 tasks in 2-hour intervals; she can have occasional brief and superficial
15 contact with the general public and co-workers.

16 Tr. 27. At step four, the ALJ found Plaintiff capable of performing past relevant
17 work as a housekeeper/cleaner. Tr. 32-33. Alternatively, at step five, the ALJ
18 found—considering Plaintiff’s age, education, work experience, and RFC—that
19 Plaintiff could perform jobs that exist in significant numbers in the national
20 economy, such as housekeeping/cleaner, bench assembler, electrical accessories
assembler. Tr. 34. The ALJ concluded that Plaintiff was not disabled under the
Social Security Act and denied her claim on that basis. Tr. 35.

The Appeals Council denied Plaintiff’s request for review on July 13, 2015,
making the ALJ’s decision the Commissioner’s final decision for purposes of
judicial review. Tr. 1-4; 20 C.F.R. §§ 416.1484, 422.210.

ISSUES

Plaintiff seeks judicial review of the Commissioner's final decision denying her supplemental security income under Title XVI of the Social Security Act. While Plaintiff raises three issues in her motion, ECF No. 17, the Court concludes the ALJ erred in failing to properly evaluate Plaintiff's fibromyalgia. Therefore, this case is remanded for further proceedings.

DISCUSSION

A. Assessment of Fibromyalgia

Plaintiff faults the ALJ for failing to classify her fibromyalgia as a medically determinable impairment pursuant to Social Security Regulation ("SSR") 12-2p at step two of the evaluation process. ECF No. 17 at 6-10.

Step-two of the evaluation process requires the ALJ to determine if the claimant has a severe medically determinable physical or mental impairment or a combination of impairments that is severe. 20 C.F.R. § 416.920(a)(4)(ii). An impairment is "not severe" if "it does not significantly limit [the claimant's] physical ability to do basic work activities," such as "walking, standing, sitting, lifting, pushing, pulling, reaching, carrying or handling." *Smolen v. Chater*, 80 F.3d 1273, 1290 (9th Cir. 1996).

Generally, "the step two inquiry is merely a de minimis screening device to dispose of groundless claims," *id.*; as a result, the ALJ's failure to classify an

1 impairment as severe is harmless if the ALJ proceeds with the evaluation process
2 and considers both severe and non-severe impairments when formulating the RFC.

3 Here, at step two, the ALJ found Plaintiff had several severe and non-severe
4 impairments; however, the ALJ found Plaintiff's fibromyalgia was not medically
5 determinable. Tr. 24. Consequently, the ALJ did not incorporate Plaintiff's alleged
6 limitations from her fibromyalgia into the RFC finding. The ALJ based this finding
7 on the absence of treatment records during the relevant period—at least the lack of
8 sufficiently detailed records—showing that Plaintiff has the trigger points of
9 tenderness consistent with fibromyalgia. Tr. 24-25. Specifically, the ALJ rejected
10 as deficient the opinion of one treating physician:

11 While David Lindgren, M.D., stated on September 30, 2011, that at
12 that time the claimant had 11/18 tender points consistent with
13 fibromyalgia, he did not detail how he performed his testing; per SSR
14 12-2p, the physician should perform digital palpation with an
15 approximate force of 9 pounds, or approximately the amount of
16 pressure needed to blanch the thumbnail of the examiner, their
17 location, the nature of her alleged pain, etc. Due to the lack of
18 specificity regarding the claimant's testing in the record, her alleged
19 fibromyalgia, under SSR 12-2p, is not a medically determinable
20 impairment.

Tr. 25 (internal record citations omitted).

18 The Social Security Administration promulgated regulations in 2012 to
19 provide guidance on how to develop evidence that a person has a medically
20 determinable impairment of fibromyalgia and how the administration evaluates

1 fibromyalgia in claims brought under Titles II and XVI of the Social Security Act.
2 SSR 12-2p, 2012 WL 3104869. A claimant must provide evidence that a licensed
3 physician reviewed her medical history, conducted a physical examination, and
4 made a fibromyalgia diagnosis. *Id.* at *2. The physician must also provide evidence
5 which satisfies one of two alternate diagnostic criteria: the 1990 American College
6 of Rheumatology Criteria for the Classification of Fibromyalgia (“1990 Criteria”),
7 or the 2010 American College of Rheumatology Preliminary Diagnostic Criteria
8 (“2010 Criteria”). *Id.* at *2-3. Under the 1990 Criteria, the evidence must show: (1)
9 “a history of widespread pain . . . that has persisted . . . for at least 3 months;” (2)
10 at least 11 positive tender points, found both bilaterally and above and below the
11 waist; and (3) evidence that other disorders which could cause the symptoms were
12 excluded. *Id.* at *3. Under the 2010 Criteria, the evidence must show: (1) a history
13 of widespread pain; (2) repeated manifestations of six or more fibromyalgia
14 symptoms, signs, or co-occurring conditions; and (3) evidence that other disorders
15 which could cause the symptoms were excluded. *Id.* Finally, the physician's
16 diagnosis must not be “inconsistent with the other evidence in the person's case
17 record.” *Id.* at *2.

18 The Commissioner concedes that the ALJ erred in assessing Plaintiff's
19 alleged fibromyalgia, ECF No. 20 at 7, and this Court agrees.

1 First, there is nothing in SSR 12-2p that requires the diagnosing physician to
2 detail precisely *how* he performed the tender point testing. *See* SSR 12-2, 2012 WL
3 3104869. The ruling merely explains how a physician should perform the testing.
4 *Id.* at *3. Dr. Lindgren's treatment records indicate that he conducted a full
5 examination and identified 11 out of 18 tender points consistent with fibromyalgia.
6 Tr. 535, 564. As Plaintiff points out, detailed documentation of *how* medical
7 providers conduct their testing is generally neither provided by the provider nor
8 demanded by the ALJ.

9 Second, while the Court notes that Dr. Lindgren did not identify the location
10 of the 11 tender points, it is the ALJ's duty to develop the record. *See Tonapetyan*
11 *v. Halter*, 242 F.3d 1144, 1150 (9th Cir. 2001). "In cases involving [fibromyalgia],
12 as in any case, [the administration] will make every reasonable effort to obtain all
13 available, relevant evidence to ensure appropriate and thorough evaluation." SSR
14 12-2, 2012 WL 3104869, at *3. Here, while the ALJ faulted Dr. Lindgren for
15 failing to identify the location of the tender points, she could have requested that
16 Dr. Lindgren supplement his treatment notes. Additionally, the ALJ could have
17 asked for the medical records of Plaintiff's visit with Dr. Fowler, the
18 rheumatologist to whom Dr. Lindgren referred Plaintiff in September 2011 and
19 who recommended treatment for Plaintiff's fibromyalgia. *See* 20 C.F.R. §
20 416.920b(c) (listing actions the administration may take when the evidence is

1 inconsistent or insufficient); SSR 12-2p, 2012 WL 3104869, at *4 (listing actions
2 the ALJ may take to resolve the insufficiency of the evidence presented, including
3 requesting additional existing records or asking the person for more information).

4 Second, the ALJ ignored other opinion evidence in the record substantiating
5 Plaintiff's fibromyalgia diagnosis. "When a person alleges [fibromyalgia],
6 longitudinal records reflecting ongoing medical evaluation and treatment from
7 acceptable medical sources are especially helpful in establishing both the existence
8 and severity of the impairment." *Id.* at *3. Dr. Fowler, a rheumatologist to whom
9 Plaintiff was referred and who examined Plaintiff in September 2011,
10 recommended treatment for her fibromyalgia. Tr. 534-35. This Court also notes
11 that the ALJ failed to mention Dr. Pellicer's clinical impression of fibromyalgia.
12 Tr. 488. Finally, state agency consultants listed fibromyalgia as one of Plaintiff's
13 medically determinable impairments. The ALJ failed to mention this evidence
14 when determining that Plaintiff's fibromyalgia was non-medically determinable.

15 Finally, even if the ALJ's analysis under the 1990 Criteria was adequate, the
16 ALJ wholly failed to analyze Plaintiff's fibromyalgia under the 2010 criteria as
17 directed under SSR 12-2p. *See Rounds v. Comm'r of Soc. Sec. Admin.*, 807 F.3d
18 996, 1005 (9th Cir. 2015) (instructing the ALJ, on remand, to consider both the
19 1990 and 2010 diagnostic criteria when evaluating the claimant's fibromyalgia
20 pursuant to the Commissioner's binding ruling in SSR 12-2p); *Mahoney-Garcia v.*

1 *Colvin*, No. 3:14-cv-5599-RBL-KLS, 2015 WL 1965382, at *2-4 (W.D. Wash.
2 Apr. 17, 2015). Importantly, Plaintiff demonstrated several fibromyalgia
3 symptoms, signs, or co-occurring conditions, including pain, social phobia,
4 memory loss, tiredness, and depression, which are relevant under the 2010 criteria.
5 Thus, the ALJ was required to abide by the binding SSR ruling, *see* 20 C.F.R. §
6 402.35(b)(1), and determine whether Plaintiff's fibromyalgia is medically
7 determinable impairment under the 2010 diagnostic criteria.

8 This Court further finds that the ALJ's step two error was not harmless.

9 First, this Court rejects Defendant's argument that Plaintiff's fibromyalgia
10 and polyarthralgia impairments are interchangeable as the ALJ treated these
11 conditions as distinct impairments in her evaluation process. Tr. 24-25.

12 Second, by classifying Plaintiff's fibromyalgia as a non-medically
13 determinable impairment—rather than a severe or non-severe impairment—the
14 ALJ excluded the effects of this condition when formulating Plaintiff's RFC,
15 “rendering the ALJ's RFC finding suspect.” *Neisinger v. Colvin*, No. 2:15-cv-1718-
16 DWC, 2016 WL 2866260, at *6 (W.D. Wash. May 17, 2016); *cf. Lewis v. Astrue*,
17 498 F.3d 909, 911 (9th Cir. 2007) (finding the ALJ's failure to discuss a claimant's
18 bursitis at step 2 harmless where the ALJ extensively discussed the condition at
19 step 4 of the analysis); *see* 20 C.F.R. § 416.929 (b) (“Your symptoms . . . will not
20 be found to affect your ability to do basic work activities unless medical signs or

1 laboratory findings show that a medically determinable impairment(s) is present.”);
2 SSR 96-8p, 1996 WL 374184, at *1 (“The RFC assessment considers only
3 functional limitations and restrictions that result from an individual's medically
4 determinable impairment or combination of impairments . . .”).

5 Finally, the ALJ’s analysis of Plaintiff’s fibromyalgia has infected her
6 assessment of the opinion evidence—namely, treating physician Dr. Lindgren. Dr.
7 Lindgren, who diagnosed Plaintiff with fibromyalgia in September 2011, opined in
8 July 2012 and April 2013 that Plaintiff would have to lie down during the day, that
9 work would deteriorate her condition, and that Plaintiff would miss four or more
10 days of work per month due to her symptoms. Tr. 564-65, 579-80. The ALJ’s
11 fibromyalgia analysis focused solely on Dr. Lindgren’s September 2011 treatment
12 notes, and in finding his notes deficient, afforded his 2012 and 2013 opinions little
13 weight when formulating Plaintiff’s RFC primarily for this reason.² Tr. 31. In
14 short, this Court is led to question whether the ALJ would have discounted Dr.

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16 ² While Dr. Lindgren’s treatment notes from February 2013 note that a
17 rheumatologist found that Plaintiff did not meet criteria for fibromyalgia, Tr. 619,
18 his April 2013 opinion indicates a continued diagnosis of fibromyalgia, Tr. 579.
19 The ALJ neither mentioned these notes nor requested that the rheumatologist’s
20 treatment records be made part of Plaintiff’s file.

1 Lindgren's opined limitations had the ALJ properly evaluated Plaintiff's
2 fibromyalgia at step two.

3 **B. Remedy**

4 In the event of reversible error, the parties disagree as to the appropriate
5 remedy. Plaintiff urges this Court to reverse for an immediate award of benefits.
6 ECF No. 17 at 24. The Government, on the other hand, asserts that the proper
7 remedy should be to remand for further proceedings. ECF No. 20 at 15 n.3.

8 "When an ALJ's denial of benefits is based upon legal error or not supported
9 by the record, the proper course, except in rare circumstances, is to remand to the
10 agency for additional investigation or explanation." *See Hill*, 698 F.3d at 1162
11 (internal quotation marks omitted). "Remand for further proceedings is appropriate
12 where there are outstanding issues that must be resolved before a determination
13 can be made, and it is not clear from the record that the ALJ would be required to
14 find the claimant disabled if all the evidence were properly evaluated." *Id.* The
15 Ninth Circuit's "credit-as-true" rule, on the other hand, directs that remand for an
16 award of benefits is appropriate when

17 (1) the record has been fully developed and further administrative
18 proceedings would serve no useful purpose; (2) the ALJ has failed to
19 provide legally sufficient reasons for rejecting evidence, whether
20 claimant testimony or medical opinion; and (3) if the improperly
discredited evidence were credited as true, the ALJ would be required
to find the claimant disabled on remand.

1 *Garrison v. Colvin*, 759 F.3d 995, 1020 (9th Cir. 2014). Even when all conditions
2 of the credit-as-true rule are satisfied, a court is required to remand for further
3 proceedings when an evaluation of the record as a whole creates serious doubt that
4 a claimant is, in fact, disabled. *Id.* at 1021.

5 Here, there are outstanding issues that must be resolved and it is unclear that
6 Plaintiff would be found disabled if all the evidence were properly gathered and
7 evaluated. By failing to properly evaluate Plaintiff's fibromyalgia, the ALJ's
8 assessment of the medical evidence and Plaintiff's RFC have been called into
9 doubt. Whether, when the evidence in the record as a whole is properly evaluated,
10 Plaintiff's physical and mental limitations impair her ability to perform basic work
11 activities must yet be resolved.

12 Upon remand, the ALJ should further develop the record and issue a new
13 decision. The ALJ should reevaluate all of Plaintiff's impairments; Plaintiff's
14 credibility; all medical and non-medical source opinions; Plaintiff's RFC; and, if
15 necessary, Plaintiff's ability to perform work at steps four and five. Plaintiff may
16 present new arguments and evidence, and the ALJ may conduct further
17 proceedings as necessary.

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1 **ACCORDINGLY, IT IS ORDERED:**

2 1. Plaintiff's Motion for Summary Judgment (ECF No. 17) is **GRANTED**.

3 2. Defendant's Motion for Summary Judgment (ECF No. 20) is **DENIED**.

4 3. Pursuant to sentence four of 42 U.S.C. § 405(g), this action is
5 **REVERSED** and **REMANDED** to the Commissioner for further proceedings
6 consistent with this Order.

7 4. The District Court Executive is directed to file this Order, enter
8 **JUDGMENT** for Plaintiff, provide copies to counsel, and **CLOSE** the file.

9 **DATED** August 23, 2016.



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Thomas O. Rice
THOMAS O. RICE
Chief United States District Judge